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No. 77-922

In the Supreme Court of the United States

OCTOBER TERM, 1977

CHRYSLER CORPORATION, PETITIONER

v.

HAROLD BROWN, SECRETARY OF DEFENSE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENTS

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-42a) is reported at 565 F. 2d 1172. The opinion of the district court (Pet. App. 43a-57a) is reported at 412 F. Supp. 171.

JURISDICTION

The judgment of the court of appeals (Pet. App. 58a-59a) was entered on September 26, 1977. The petition for a writ of certiorari was filed December 27, 1977, the day after a holiday. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether federal agencies may elect by regulation to disclose information that is exempt from mandatory disclosure under the Freedom of Information Act and that is of the character described in 18 U.S.C. 1905.

2. Whether judicial review of an agency's decision to disclose information is limited to review of the administrative record under the Administrative Procedure Act.

STATEMENT

The facts of this case are set forth in detail in the court of appeals' opinion (Pet. App. 1a-20a). Petitioner brought this action in the United States District Court for the District of Delaware, seeking to enjoin respondents[1] from complying with requests under the Freedom of Information Act, 5 U.S.C. 552, for disclosure of certain information that petitioner had furnished to respondents in fulfillment of petitioner's contractual obligations. See Executive Order 11246, 30 Fed. Reg. 12319, as amended by Executive Order 11375, 32 Fed. Reg. 14303; 41 C.F.R. 60-1.4. The information at issue is contained in two affirmative actions plans,[2] which government contractors generally are required to submit to respondents as part of the Executive Order's program of eliminating employment discrimination, and in a compliance review report and a complaint investigation report, which were prepared by the Defense Supply Agency of the Department of Defense in connection with its determination whether petitioner is complying with its obligations under the anti-discrimination program.[3]

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[1]In addition to the Secretary of Defense, respondents are the Secretary of Labor, the Director of the Office of Federal Contract Compliance Programs, and the Director of the Defense Supply Agency (see note 3, *infra*).

[2]Among other things affirmative action plans include petitioner's annual Employer Information Report, known as an EEO-1 report, which contains data on the number of women and members of minority groups that petitioner employs.

[3]The Secretary of Labor has the responsibility of directing the federal government's equal employment opportunity program with respect to government contractors and has promulgated regulations governing this program. See 41 C.F.R. Part 60. Under these regulations the Secretary has delegated administrative responsibility to the Director of the Office of Federal Contract Compliance Programs (OFCCP). 41 C.F.R. 60-1.2. In turn, the Director has designated various federal agencies as "compliance agencies" and has delegated to each of them primary responsibility for assuring adherence to the equal employment opportunity program by contractors within certain geographical areas or industrial classifications. See 41 C.F.R. 60-1.6. See also OFCCP Compliance Manual § 2-202. In petitioner's case, the Defence Supply Agency of the Department of Defense was the designated compliance agency. (The Defense Supply Agency is now the Defense Logistics Agency.)

The Defense Supply Agency decided to disclose substantial portions of the requested documents.[4] This decision was authorized by regulations promulgated by the Secretary of Labor. 41 C.F.R. Part 60-40 (Pet. App. 62a-65a). The regulations "implement * * * the Freedom of Information Act" (FOIA) and give effect to "the policy of the [Office of Federal Contract Compliance Programs (see note 3, *supra*)] to disclose information to the public and to cooperate with other public agencies as well as private parties seeking to eliminate discrimination in employment." 41 C.F.R. 60-40.1. As a general guideline for the implementation of this policy, the regulations provide that "[u]pon the request of any person * * * records shall be made available for inspection and copying, notwithstanding the applicability of the exemption from mandatory disclosure [under the Freedom of Information Act], if it is determined that the requested inspection or copying furthers the public interest and does not impede any of the functions of the [Office of Federal

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[4]In general, the portions of the documents the Agency determined not to disclose concerned wage data, or information that might invade the privacy of employees such as salary, personnel records, job applications, promotion analysis, etc.

Contract Compliance Programs] or the Compliance Agencies except in the case of records disclosure of which is prohibited by law." 41 C.F.R. 60-40.2(a).[5]

After a trial at which it heard extensive evidence, the district court found that part of the information the Agency proposed to release was exempted from mandatory disclosure by exemption 4 of the FOIA (Pet. App. 49a-52a). Although it rejected petitioner's argument that exemption 4 prohibited disclosure, the court concluded that release of this information would violate 18 U.S.C. 1905, a criminal statute prohibiting government officials from disclosing certain information "in any manner or to any extent not authorized by law" (Pet. App. 52a-55a). The district court enjoined respondents from disclosing this information but concluded that the remainder of the documents was not protected from public disclosure.

On cross-appeals, the court of appeals explained that it was "in substantial agreement" with respondents (Pet. App. 3a) concerning the general principles and standards that should govern the case. It concluded that the

[5]Under this general guideline, the Secretary of Labor has determined that, on request, EEO-1 reports "which [are] submitted by contractors to the OFCC[P] [or] a compliance agency * * * shall be disclosed." 41 C.F.R. 60-40.4. The Secretary also has determined that affirmative action plans generally "must be disclosed." 41 C.F.R. 60-40.2(b)(1). But the regulations contain exceptions for two specified portions of affirmative action plans (see 41 C.F.R. 60-40.3(a)(1)-60.40.3(a)(2)), which "should be withheld if it is determined that the requested inspection or copying does not further the public interest and might impede the discharge of any of [OFCCP's or the compliance agencies'] functions." 41 C.F.R. 60-40.3(a). Portions of compliance review reports and complaint investigation reports are also subject to withholding under the same standard "during the course of the review to which they pertain or while enforcement action against the contractor is in progress or contemplated within a reasonable time." 41 C.F.R. 60-40.3(a)(5).

exemptions from mandatory disclosure under the FOIA, including exemption 4, permit but do not require federal agencies to refuse disclosure of information covered by the exemptions (Pet. App. 22a-25a), and that the Secretary of Labor's regulations governing disclosure of the information at issue were valid and, if properly applied, authorize disclosure so that 18 U.S.C. 1905 does not apply (Pet. App. 27a-30a).

The court held that it had authority under the Administrative Procedure Act to review the agency's decision to apply the regulation to particular facts, but it concluded that no authority to enjoin disclosure could be inferred from either the FOIA or 18 U.S.C. 1905 (Pet. App. 25a, 30a-31a). Moreover, the court ruled that any review of the administrative decision should be on the basis of the administrative record, not on the basis of testimony or evidence introduced in the district court. If the administrative record is inadequate to permit effective review of the agency decision, the court said, "the remedy is not a trial *de novo*, but a remand to the agency for an additional record or explanation for its decision" (Pet. App. 39a). In this case the court of appeals held that the agency record was not adequate, and accordingly the court remanded the case to the district court for entry of an order that the Defense Supply Agency conduct further proceedings (Pet. App. 39a-40a).

DISCUSSION

We believe that the court of appeals' analysis and disposition of this case is correct. Our petition for a writ of certiorari in *Westinghouse Electric Corp.* v. *Schlesinger*, 542 F. 2d 1190 (C.A. 4), certiorari denied *sub nom. Brown* v. *Westinghouse Electric Corp.*, 431 U.S. 924, took a similar position concerning "reverse FOIA"

suits.[6] In our view: (1) a government agency may elect to disclose information that is exempt from mandatory disclosure under the FOIA and, if it issues appropriate authorizing regulations, it may do so even though the information is of the character described in 18 U.S.C. 1905; and (2) judicial review of an agency's decision to disclose information pursuant to such regulations is authorized by the Administrative Procedure Act, but review should proceed on the basis of the administrative record.

We do not oppose the petition for a writ of certiorari, because we agree with petitioner that this case raises important questions that should be resolved by this Court. Many "reverse FOIA" cases recently have been filed.[7] These cases call into question the purpose of the Freedom of Information Act, its use by private parties to obtain judicial relief against the disclosure of information, and the role of the Executive Branch in discharging the legislative directive, affirmatively expressed in the Act, to permit the "fullest responsible disclosure." S. Rep. No. 813, 89th Cong., 1st Sess. 3 (1965).

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[6]Our petition in *Westinghouse* was submitted to the court of appeals (and served on counsel) in this case, because the position taken in the petition departed somewhat from the position urged in respondents' opening appellate brief (see Pet. App. 3a, 35a). The petition was accompanied by a letter from government counsel stating: "Since the arguments presented in the petition in *Westinghouse Electric Corporation* are applicable to the instant case, we are providing the Court with copies of the petition, and rely on the arguments presented therein to the extent that they may differ from the positions taken in the brief filed with this Court."

[7]In 1976 at least 78 reverse FOIA cases were brought against the government, and in 1977 63 new reverse FOIA cases were filed.

Moreover, the decision of the court of appeals in this case squarely conflicts with *Westinghouse Electric Corp.* v. *Schlesinger, supra*.[8] See also *Charles River Park "A", Inc.* v. *Department of Housing and Urban Development*, 519 F. 2d 935 (C.A. D.C.). Although the Court denied the petition for a writ of certiorari in *Westinghouse*, a conflict now is firmly established and should be resolved.[9] Prompt resolution of these questions will prevent unnecessary litigation in the many pending cases and dispel the uncertainty that prevails.

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[8]See also *Reynolds Metals Co.* v. *Rumsfeld*, 564 F. 2d 663, 667 n. 8 (C.A. 4).

[9]Petitioner's second question presented—"[w]hether agency regulations promuglated pursuant to 5 U.S.C. §301 constitute 'authorization by iaw' within the meaning of 18 U.S.C. §1905 for disclosure of private, confidential business information" (Pet. 2)—is too narrow. If the Court grants the petition, we would argue that the regulations governing disclosure of the documents at issue are authorized not only by 5 U.S.C. 301 but also by the FOIA and Executive Order 11246. Although the court of appeals held that the regulations were validly promulgated under 5 U.S.C. 301, and therefore did not consider alternative sources of authority, the court stated that its "deferment of these grounds for sustaining the regulations should not be considered an expression of doubt as to these sources of authority, but only of confidence in our * * * §301 holding" (Pet. App. 30a).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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